No. 22366.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN SAVINGS AND LOAN ASSOCIATION, a corporation, and FIDELITY SERVICE CORPORATION, a corporation,

Appellants,

vs.

WILLIAMS CONSTRUCTION CO., a corporation, and A. J. BUMB, Receiver,

Appellees.

APPELLANTS' REPLY BRIEF.

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I.
Preliminary Statement.

Appellants Metropolitan Savings and Loan Association ("Metropolitan") and Fidelity Service Corporation submit this brief in response to the Answering Brief of Appellee Williams Construction Co. ("Williams") and Appellees' Brief of A. J. Bumb ("Bumb"). Where the answer to a contention advanced by Appellees embraces material set forth in Appellants' Opening Brief, Appellants will cite to and summarize such material herein rather than setting it forth *in extenso*.

II.
Under California Law, Williams Has No Right to a Partial Reconveyance From Metropolitan's Deed of Trust.

In their Opening Brief, Appellants pointed out that under California law a trustor has no right to the partial reconveyance of property subject to a deed of

trust in the absence of a provision in the deed of trust authorizing such a reconveyance; and that when the deed of trust does provide for a partial reconveyance, a trustor, in order to be entitled to such partial reconveyance, must comply with the conditions which the deed of trust prescribes therefor (Appellants' Op. Br. pp. 13-15).

In the instant case, the deed of trust expressly provided that Williams was entitled to the release of individual lots from Metropolitan's lien only if two conditions were satisfied: (1) the loan which Metropolitan's deed of trust secured was not mature; and (2) the loan was not in default. At the time of the entry of the order of the bankruptcy court authorizing partial reconveyances from Metropolitan's encumbrance, the loan was both mature and in default. Because the conditions were not satisfied, Williams had no right to a partial reconveyance.

Neither of the Appellees directly dispute Appellants' statement of the law, but Williams makes two contentions in an effort to avoid its effect:

1. That, regardless of any right of Williams to secure the release of individual lots from the deed of trust to which the bankruptcy court may have succeeded, the instant case "involves the power of the Bankruptcy Court to order a judicial sale of encumbered property, free of the encumbrance, and to determine the manner of sale appropriate in the circumstances." (Answering Brief of Appellee Williams Construction Company, p. 23). The argument is answered by Appellants in Sections III and IV, *infra.*
2. That the California courts have decided cases involving the right to the partial release of security from a lien on an "*ad hoc*" basis, and because this is a bankruptcy situation the California

courts would, if given the opportunity, override the settled rule that the right to a partial reconveyance of security is governed by the terms of the security instrument. To quote Williams, "In a case in which the rights of the secured creditors can be protected,[1] and the rights of third parties are at issue,[2] there is considerable reason to believe the California courts would give effect to a release clause [notwithstanding the fact that the conditions for release contained in the release clause are unsatisfied]" (Answering Brief of Appellee Williams Construction Company, p. 26).

Insofar as the second argument is concerned, what Williams bases its conclusion on, except wishful thinking, is not clear; certainly the authorities cited by Williams do not support it.

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[1]This is a purely hypothetical assumption—the rights of Metropolitan in this case have manifestly not been adequately protected (See Sections IV and VI, *infra*).

[2]Throughout its brief, Williams seeks to picture itself as the solicitious protector of (presumably small and defenseless) unsecured creditors, while portraying Metropolitan as the corporate counterpart of the nineteenth century stage villain. It contends that this Court should dispose of the present appeal favorably to Williams in the interests of these anonymous but omnipresent third parties "who have created the value that exists in the property by cutting lots out of raw acreage, installing the curbs, paving the streets, putting in the underground utilities, and carrying out all of the other activities requisite to manufacturing lots" and "who will otherwise lose everything" (Answering Brief of Appellee Williams Construction Company, p. 12).

The argument is faulty for several reasons. First, the facts do not support it. There is no evidence in the record of which Metropolitan is aware to indicate either the source of the claims of these unsecured creditors or that a ruling in favor of Metropolitan would cause them to "lose everything." Further, and more fundamentally, the function of the bankruptcy court is to protect all interests in accordance with law and not to rule in accordance with a desire to equalize wealth.

The first case discussed by Williams in this connection is *Sacramento S. F. L. Company v. Whaley,* 50 Cal. App. 125 (1920), in which the court held that the trustors were entitled to the reconveyance of a portion of their security, even though the loan was in default.

The difficulty with the *Whaley* case for Williams' purposes—a difficulty recognized by Williams[3]—is that the reconveyance was not in contravention of the terms of the deed of trust; rather, *it was expressly authorized by it.* The deed of trust did not limit the exercise of the right to reconveyance to the period during which the loan was not in default, but provided simply that:

> " 'Said mortgagee shall release any ten acre lot or more from the lien of this mortgage upon the payment by the said mortgagors to the mortgagee of one hundred and twenty-five ($125.00) per acre for each acre so to be released.' " (50 Cal. App. 126).

Indeed, the issue before the court was whether the *fact of default itself* would vitiate the right to a partial release of security *authorized by the terms of the deed of trust.* There is nothing whatever in the case which suggests that contractual limitations upon the exercise of the right to a partial reconveyance would not be enforced as stringently in a bankruptcy situation as in any other.

Another case relied upon by Williams is *Conley v. Poway Land & Inv. Co.,* 232 Cal. App. 2d 22 (1965), cited by Appellants on page 14 of their Opening Brief.

Williams' treatment of the *Conley* case is highly misleading because it indicates that the case upheld the right of a trustor to the release of property subject to a deed

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[3]"In this case [*Whaley*], the parties did not attempt to place any limitation on the operation of a release clause." (Answering Brief of Appellee Williams Construction Company, p. 24).

of trust in contravention of the terms of the applicable release provision. In fact the contrary is true.

The governing contractual provision, of which Williams conveniently ignores all but the first phrase, is as follows:

> " 'So long as the trustor be not in default concerning any of the covenants contained herein or with respect to the payments due on the promissory note secured hereby, a partial reconveyance may be had and will be given from the lien or charge hereof of any portion of the property herein before [sic] described upon payment of an amount to apply on the principal of said note, based on a rate of $1,149.00 for each acre. . . . Trustor may at any time make a payment to Trustee, for the purpose of securing a partial reconveyance in which event Trustee shall, without the necessity of any approval by Beneficiary or Beneficiaries or the securing of any further documents, make a partial reconveyance of such portion or portions of the property hereinbefore described as Trustor may request provided only so much acreage shall be reconveyed as Trustor has paid for at the rate per acre mentioned in this paragraph. . . .' " (232 Cal. App. 2d 25).

The trustor made the required payment before default but did not request a reconveyance until after a default had occurred. Hence, the question before the court was whether the occurrence of the default would have the effect of divesting the trustor of a right to a partial reconveyance which accrued upon the making of the required payment in timely fashion. The court held:

> "We interpret *the language of the deed of trust to mean* that no right to reconveyance could accrue while the trustor was in default but that it has no application to such rights accrued before default." (232 Cal. App. 2d 27; emphasis added).

In other words, the court gave effect to the terms and conditions of the security instrument as it construed them. There is nothing whatever in the opinion to suggest a disposition on the part of the California courts to subvert the rule that the right to the partial release of security from an encumbrance is governed by the terms of the encumbrance. Indeed, the case supports that rule.[4]

Finally, Williams' treatment of *Bradbury v. Thomas*, 135 Cal. App. 435 (1933) can only be regarded as an admission of the weakness of its position. Williams quotes a passage from the opinion and characterizes that passage as indicating that the trial court might have reached a different conclusion had "equitable considerations" been before it (Answering Brief of Appellee Williams Construction Company, p. 24).

A reading of the passage demonstrates that no such inference can properly be drawn therefrom and that, in fact, the court held that in the absence of a contractual provision authorizing it, there is no way for a trustor to obtain the partial release of security from a lien:

> "It is obvious that appellants rely solely upon the release clause of the mortgage. This must be so for it is the only provision which furnishes any force to their claim that they are entitled to have their title to fifteen lots quieted against respondent's mortgage lien. Certainly, if the mortgage had contained no release provision there could have been no pretense on their part that they were en-

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[4]Furthermore, Appellants wish to emphasize, as they did in their Appellants' Opening Brief, that this is not a situation in which a secured creditor is attempting to exploit a mere technical noncompliance with conditions; the noncompliance with the conditions for partial reconveyance is gross (See Appellants' Op. Br. p. 15).

titled to have any of the mortgaged premises declared freed from the mortgage lien." (135 Cal. App. 442).[5]

III.

The Powers of the Bankruptcy Court to Order the Sale of Encumbered Property Free and Clear of Liens and to Determine Whether the Sale of the Bankrupt's Property Shall Be in Bulk or in Parcels Are Powers to Determine the Procedure by Which the Estate Shall Be Liquidated; Neither Separately nor Together Do They Permit the Bankruptcy Court to Abrogate the Substantive Legal Rights of Secured Creditors in a Chapter XI Proceeding.

Appellees' principal defense of the action of Referee Kinnison in ordering the sale of individual lots free and clear of Metropolitan's deed of trust is that it involved the exercise of power conferred by Federal law and independent of any power acquired through succession to the rights of the bankrupt (or, in this case, debtor). Reduced to essentials, what Appellees are saying is that the powers of the bankruptcy court include the following:

1. The power to sell encumbered property, free and clear of liens;
2. The power to determine whether the assets of the bankrupt estate shall be sold in bulk or in parcels,

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[5]How Williams can quote the statement from the *Bradbury* case "'if the mortgage had contained no release provision there could have been no pretense on their [the mortgagors'] part that they were entitled to have any of the mortgaged premises declared free [sic] from the mortgage lien'" and then argue that had there been no release provision in the Williams' deed of trust "it is rather clear that the court could have ordered a sale in parcels or lots" (Answering Brief of Appellee Williams Construction Company, pp. 24-25) is frankly incomprehensible to Appellants. The *Bradbury* case makes it emphatically clear that it is only when there *is* a release provision that the mortgagor is entitled to the release of a portion of his security.

dened with a frozen asset. (For a discussion of the particularly adverse consequences of such an asset upon a saving and loan association, see Appellants' Op. Br. pp. 28-30).

2. The security for Metropolitan's loan consists at the present time of a tract of substantially contiguous lots subject to development on an integral basis. The effect of the order that the lots are to be sold on an individual basis free and clear of Metropolitan's lien would be to transform the character of that security into an aggregation of non-contiguous lots not subject to such development.

3. Metropolitan made a loan to Williams of eight months duration. The effect of the orders in question is to rewrite the loan into a loan for the duration of the time required to sell off the lots, probably a period of many years.[7]

Since Appellees' answer to the foregoing consists in large measure of a recital of the findings of Referee Kinnison and argument based upon those findings, Appellants wish to emphasize that the instant appeal is not predicated upon the contention that the findings of fact entered by the bankruptcy court are erroneous.[8]

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[7]The foregoing contrasts sharply with Williams' narrow and incomplete characterization of Appellants' position (Answering Brief of Appellee Williams Construction Company, p. 17).

[8]Obviously Appellants do not accept findings such as "there is a substantial equity of the debtor in the said property" [C.T. p. 69, lines 31-32] or that "a sale of said lots free and clear of the lien of the respondent Metropolitan Savings and Loan Association will in no way impair any substantive right of said respondent" [C.T. p. 70, lines 10-13]. These, however, are not really findings of fact but, rather, conclusions as to the legal effect of facts which are the subject of other findings. While Appellants do feel that the findings entered by the bankruptcy court are defective for failure to find on the material issues, it is clear from the record that if such findings had been made they

The dispute between Appellants and Appellees is not as to the facts but rather as to *the legal effect of facts which, in their material respects, are undisputed.* (Appellees' argument that there is no evidence in the record to support certain facts allegedly relied upon by Appellants is wrong: as demonstrated *infra,* either there *is* such evidence, or the fact is not one upon which Appellants relied.) Hence, rules which limit the role of an appellate court with respect to questions of fact resolved by the trier of fact have no application here.

Williams asserts that the order for the sale of the lots "was fully consistent with the intentions and the expectations of the parties at the time they entered the agreement." As evidence of the intent it cites the character of the lots and that under the terms of Metropolitan's deed of trust, Metropolitan "valued each lot separately."[9] (Answering Brief of Appellee Williams Construction Company, p. 14).

Although the deed of trust does provide for the release of individual lots, the parties contemplated that such release would be permitted only in a "going" situation in which regular payments were being made on the indebtedness and the property was being sold off on a normal basis. This has little relationship to the contemplation of the parties in a salvage situation. In-

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would have been in Appellants' favor. For example, there is no finding on the amount which the lots could be expected to bring if sold as a tract, and Metropolitan objected to the absence of such a finding [C.T. p. 63, lines 15-26]. The evidence that a sale on this basis would not yield a surplus over and above the indebtedness secured by Metropolitan's lien is, however, clear and uncontradicted [R.T. p. 310, lines 5-10].

[9]This is incorrect. The deed of trust did not purport to ascribe a value to the lots but only to prescribe the amount by which the principal indebtedness of Williams to Metropolitan would have to be reduced prior to maturity and absent a default in order to secure the release of a given lot from Metropolitan's encumbrance.

deed, the limitations upon Williams' right to secure the release of individual lots—including a fixed date (the maturity date of the loan) after which no further releases would be permitted, and a requirement that the loan not be in default—clearly indicate a desire and intent on the part of Williams *and* Metropolitan to preserve the tract character of the land in the event the project ran into difficulty.

Williams' attempt to equate the tract to "two lots located in separate parts of the state" is so plainly contrary to the facts as to be ludicrous (Answering Brief of Appellee Williams Construction Company, p. 14). The two pages of Williams' brief, pages 15 and 16, devoted to quoting findings of Referee Kinnison relating to such matters as the lot numbers, zoning, proximity to streets, elevation, topography, curbs, gutters and utilities cannot obscure the simple fact that at present the property consists of a tract of 109 substantially contiguous lots susceptible to development on an integral basis. It would become progressively less susceptible to such development if individual lots were to be sold off until, at some point, integral development would be precluded (See Appellants' Op. Br. pp. 22-23, 31-32). Williams' claim that this is not a situation in which "a filling station could be constructed in the middle of what might otherwise be a golf course" (Answering Brief of Appellee Williams Construction Company, p. 14), while true, merely means that the order of sale could be even more outrageous if circumstances were different; that does not make it acceptable under existing circumstances.[10]

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[10]Williams' suggestion that Metropolitan's opposition to the orders in question is motivated by a desire to secure for itself the surplus over Metropolitan's indebtedness which such a lot by lot sale of the tract would allegedly produce (Answering Brief of Appellee Williams Construction Company, pp. 11-12) is totally without evidentiary support. Indeed, there is evi-

Williams' assertion that the factual basis for Metropolitan's claim that its substative rights will be impaired by the order of sale consists "almost exclusively of speculation" (Answering Brief of Appellee Williams Construction Company, p. 17) reflects both ignorance of the content of the record on appeal and a misconception of Metropolitan's position.

The statement that "[t]here is no evidence that the time of sale [of the lots on an individual basis] would necessarily be 'three, four or five years'" (*ibid*) is flatly untrue. Taylor Dark, an expert witness, testified based upon detailed land development and demographic studies that approximately four years would be required to sell off the lots [R.T. p. 279, line 8, to p. 286, line 9].

If that were not enough, we have Williams' own experience. Harold E. Williams, the president of Williams Construction Company, testified to the intensive efforts that he made to sell the lots prior to the commencement of Chapter XI proceedings:

> "Q. [by Metropolitan's counsel] Did you make any attempt whatsoever prior to January 27, 1966 [the date on which Chapter XI proceedings were commenced] to dispose of any portion of the 109 lots, any one of them or any two of them or any of them?
>
> "A. [by Williams] *I made constant efforts to dispose of them.*" [R.T. p. 159, line 26 to p. 160, line 4; emphasis added].

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dence directly to the contrary: when Metropolitan felt that there was a likelihood that it would acquire the lots through purchase at foreclosure, it expressed a clear desire to resell the entire tract as a tract [See R.T. p. 370, line 2, to p. 371, line 9; R.T. p. 411, lines 3-16; R.T. p. 421, lines 3-9]. Furthermore, the foreclosure of Metropolitan's deed of trust would occur at a public sale. If this alleged "third of a million dollar profit" is such a lure to Metropolitan as Williams purports to believe, surely it would attract others also; and a third party might well wind up buying the tract.

While Williams was extremely vague as to the dates on which these "constant efforts" were being made [R.T. p. 160, line 8, to p. 164, line 25], it is evident from his testimony that an attempt to sell off the tract was in progress during all or most of 1965. In its sales program Williams employed several brokers, one of whom had an exclusive listing for approximately six months and the other an exclusive listing for approximately three months. There is no evidence that these brokers were anything less than diligent in their sales efforts, and by Williams' own admission one of the brokers, Agnes Kerr, "ran advertising and made the normal sales efforts" and "impressed [him, Williams] with her approach to the area" [R.T. p. 169, lines 1-12; R.T. p. 170, lines 1-15; R.T. p. 171, lines 4-25].

What was the measure of Williams' success? A quotation from the Answering Brief of Appellee Williams Construction Company, page 16, is a complete answer to that question:

> "Eight of the lots of the original tract were sold in the first six months of 1965. . ."

(While twelve other lots were sold at various times during 1965, most of these were not sales at price levels which would yield a surplus over and above Metropolitan's encumbrance; one of the lots was given in satisfaction of an indebtedness and others were sold at what Harold Williams described as "absolute cost" [R.T. p. 207, line 20, to p. 208, line 3; R.T. p. 171, line 26, to p. 177, line 17]).

In other words, Williams was able to sell an average of one and one-third lots per month, before its loan from Metropolitan matured and became delinquent. There is nothing whatever in the record before this court to suggest that a receiver in bankruptcy would be any more successful than Williams, whose inability to sell the lots was what evidently drove it to recourse to

Chapter XI proceedings. Yet at the sales rate set by Williams' own experience, *approximately seven years would be required to sell off the entire tract.*

Williams is correct in its assertion that "[t]here is no evidence to indicate that the value of the unsold lots will decrease as more lots are sold" (*ibid.*). But Metropolitan never claimed that such a decrease in value would take place.[11] Williams is glibly answering an argument that Metropolitant never made.

Finally, Williams considers the "potential time delay," as Williams euphemistically describes it, in liqudating Williams' indebtedness to Metropolitan which the orders in question entail. It complacently notes that "there is a certain delay inherent in any extension of secured credit to a debtor who may ultimately be compelled to resort to the assistance of the bankruptcy law" and "the concept of fair market value necessarily implies a reasonable time in which to make the sale" (Answering Brief of Appellee Williams Construction Company, p. 18).

What Williams ignores, however, is that the source of that "certain delay" experienced when a debtor has recourse to bankruptcy proceedings is the power of the bankruptcy court to restrain secured creditors from foreclosing their security so as to preserve the *status quo* and prevent interference with its jurisdiction. The power does not permit the bankruptcy court to abridge

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[11]What Metropolitan did say is that probably the lots remaining after an unsuccessful sales program would very likely be the least desirable and least saleable in the tract (Appellants' Op. Br. p. 32). Lots are obviously not fungible; each is unique and possesses attributes which affect its desirability and, hence, saleability. Undoubtedly factors such as price and individual preference are of some significance, but anyone who has ever been to a department store sale on the second day knows that the "picking over" process is an ever present phenomenon of the commercial world, as applicable to lots as to lingerie.

the *substantive* legal rights of a secured creditor (See Appellants' Op. Br. p. 24, note 7).

It is likewise true that "the concept of fair market value necessarily implies a reasonable time in which to make the sale." But a "reasonable time" to sell what? Suppose that a secured creditor had a lien upon a carload of a million nuts and bolts. Is the "reasonable time" the time necessary to sell the nuts and bolts individually or is it the time necessary to sell them as a stock?

Williams implies that Appellants' objection to the delay in liquidating its indebtedness is less meritorious because of the delay brought about by Metropolitan's efforts to seek review of the orders in question (Answering Brief of Appellee Williams Construction Company, pp. 18-19). Such reasoning is indefensible. The bankruptcy court entered orders which Metropolitan regards as illegal and prejudicial to its interests. Metropolitan has taken appropriate steps through proper judicial channels to seek review of those orders and to vindicate its position. What Williams is apparently saying, in effect, is that a litigant should forego review of judicial actions when further injury to the litigant may result from the process of review. According to this kind of logic, no one should sue for defamation because the suit gives further currency to the defamatory material. Indeed, a person from whom money has been stolen should not sue to recover it because more money will be spent in the judicial process.

Appellees, and particularly Appellee Bumb, attempt to justify the orders of the bankruptcy court by showing that under them Metropolitan will ultimately recover its money. Bumb argues that there is no evidence that the sale of the lots "will produce anything other than a full payment to the Appellants" (Appellees' Brief of

A. J. Bumb, p. 15) and points out that Referee Kinnison indicated that the bulk of the proceeds of the sales would be paid over to Metropolitan.[12]

Whether Metropolitan will, in fact, be paid off under the orders of the bankruptcy court is not at all clear.[13] Should it not be, Metropolitan will then be forced to look to security other than that for which it contracted to satisfy the indebtedness remaining due to it.[14]

But even if it is ultimately paid off, this does not answer the objection that Metropolitan made a loan for a limited period—not the years that a sell off of the lots on an individual basis will require (See Appellants' Op. Br. pp. 23-25).

In summary, nothing that Appellees say can conceal one simple, unavoidable and dispositive fact—the orders of the bankruptcy court, entered in a Chapter XI proceeding in which only the rights of unsecured creditors may be affected, abridge Metropolitan's substantive legal rights.

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[12]This, incidentally, was only an oral statement made by the Referee during the course of oral argument (R.T. [November 28, 1966] p. 13, line 23, to p. 14, line 12). To the best of Appellants' knowledge there is nothing in any court order to reflect it.

[13]While "[t]here is no evidence to indicate that all of the lots *cannot* be sold on a lot by lot basis" (Answering Brief of Appellee Williams Construction Company, p. 17, emphasis added), Metropolitan has no assurance that they *can* be sold, at least at the price levels necessary to pay off Metropolitan in full. *In re Beardsley,* 38 F. Supp. 799, 803 (D.C. Md. 1941). (See Appellants' Op. Br. p. 32).

[14]Appellee Bumb states that "The Appellants argument that the property would progressively lose its character as a tract, if true, and if a part of this record, could be used as an argument on behalf of this Appellee to the effect that as property is sold the Appellant's interest in the balance of the tract would be increased. The Appellee then would be in the position ascribed to the Appellants by the opening brief of the Appellants." (Appellees' Brief, p. 15). The statement is frankly unintelligible to Appellants and Appellants are therefore unable to respond to it.

V.

There Is No Realizable Equity in the Property.

The sole purpose—and hence justification—for the order restraining Metropolitan from foreclosing its deed of trust was to confer a benefit upon the debtor's estate through the preservation, for the estate, of any surplus which could be realized from the sale of the subject property over and above the amount of the encumbrances. Unless the bankruptcy court has the power to order the sale of the property in a manner which will produce such a surplus—and the only way in which this could conceivably be done is by impairing Metropolitan's substantive rights by ordering a sale of individual lots free of the lien—the justification for the order collapses. Appellees' entire argument that there is an equity rests upon the assumption that the bankruptcy court has the power to order such a sale; but as Appellants demonstrated in Sections III and IV, *supra,* it does not (See Appellants' Op. Br. pp. 13-25).[15]

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[15]Appellee Bumb indicates that Appellants are seeking to reformulate the definition of "fair market value" employed by Referee Kinnison (Appellees' Brief of A. J. Bumb, p. 8). This is misleading. Let us assume, *arguendo,* that the definition of "fair market value" set forth by Referee Kinnison—" 'The amount in cash that in all probability would be arrived at by fair negotiation between an owner willing to sell and a purchaser willing to buy, given a reasonable time to negotiate.' " [R.T. p. 393, lines 2-9]—is correct. This still does not identify *what* is being sold. Referee Kinnison found the fair market value of the lots if sold individually. But since it is only as a tract that the lots *can* be sold, it is the "fair market value" *of the tract, not of the lots individually,* that is relevant for purposes of the instant proceeding. Because a person does not normally buy an entire tract of lots for his own use, the fair market value of the tract is its value to someone who is buying them for resale; and someone buying them for resale would, of course, expect to make a profit.

VI.

The Orders of the Bankruptcy Court Are Illegal Because Their Implementation Will Cause Metropolitan Substantial Injury.

A court may restrain a secured creditor from foreclosing under its deed of trust or order the sale of encumbered property free and clear of liens only when such orders do not cause substantial injury to the secured creditor. In this case the orders in question injure Metropolitan in several ways. The nature of the injury is shown in Appellants' Opening Brief, at pages 27-32. Nothing in the Answering Brief of Appellee Williams Construction Company or the Appellees' Brief of A. J. Bumb in any way vitiates the force of that showing.

VII.

Concluson.

The decision of the Court below is erroneous. It should be reversed with directions to vacate the referee in bankruptcy's order restraining Metropolitan from foreclosing its deed of trust and order authorizing the sale of the lots subject thereto free and clear of Metropolitan's lien.

Respectfully submitted,

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